

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1021 Award of Attorney Fees in Public Records Enforcement Actions

**SPONSOR(S):** Steube

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	Moore	Williamson
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

### SUMMARY ANALYSIS

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

If an agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced. Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is considered a legal consequence that is independent of the public records request.

Once an enforcement action has been filed, an agency, or a contractor acting on behalf of an agency, can be held liable for attorney fees even after the agency has produced the requested records. The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial. Granting attorney fees also makes it more likely that public agencies will comply with public records laws and deter improper denials of requests. If the court finds that the agency unlawfully refused access to a public record, the court must order the agency to pay for the requestor's reasonable costs of enforcement, including reasonable attorney fees.

The bill amends current law to provide that in a public records enforcement lawsuit, a court may, but is not required to, award reasonable enforcement costs, including attorney fees, to the complainant if the court determines the agency unlawfully refused to provide a public record. To be awarded such costs, the bill also requires a complainant to provide written notice of the public records request to the agency's records custodian at least 5 business days before filing the lawsuit.

The bill may have a negative fiscal impact on the private sector and a positive fiscal impact on the state and local governments.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.01, F.S., provides that it is the policy of the state that all state, county, and municipal records are open for personal inspection and copying by any person, and that it is the responsibility of each agency<sup>1</sup> to provide access to public records.<sup>2</sup> Section 119.07(1), F.S., guarantees every person a right to inspect and copy any public record unless an exemption applies. The state's public records laws are construed liberally in favor of granting public access to public records.

##### Inspection and Copying of Public Records

Current law describes the duties and responsibilities of a custodian of public records<sup>3</sup> (records custodian). Section 119.07(1), F.S., requires a records custodian to permit records to be inspected and copied by any person, at any reasonable time,<sup>4</sup> under reasonable conditions, and under supervision by the records custodian. Generally, a records custodian may not require that a request for public records be submitted in a specific fashion.<sup>5</sup>

An agency is permitted to charge fees for inspection or copying of records. Those fees are prescribed by law and are based upon the nature or volume of the public records requested. Section 119.07(4), F.S., provides that if the nature or volume of the request requires extensive use of information technology or extensive clerical or supervisory assistance, the agency may charge, in addition to the actual cost of duplication, a reasonable service charge based on the cost incurred for the use of information technology and the labor cost that is actually incurred by the agency in responding to the request. The term "labor cost" includes the entire labor cost, including benefits in addition to wages or salary.<sup>6</sup> Such service charge may be assessed, and payment may be required, by an agency prior to providing a response to the request.<sup>7</sup>

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<sup>1</sup> Section 119.011(2), F.S., defines the term "agency" to mean any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of chapter 119, F.S., the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any agency.

<sup>2</sup> Section 119.011(12), F.S., defines the term "public records" to mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

<sup>3</sup> Section 119.011(5), F.S., defines the term "custodian of public records" to mean the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.

<sup>4</sup> There is no specific time limit established for compliance with public records requests. A response must be prepared within a reasonable time of the request. *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984). What constitutes a reasonable time for a response will depend on such factors as the volume of records that are responsive to a request, as well as the amount of confidential or exempt information contained within the request.

<sup>5</sup> See *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001) (holding that public records requests need not be made in writing).

<sup>6</sup> *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

<sup>7</sup> Section 119.07(4), F.S.; see also *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (stating if a requestor identifies a record with sufficient specificity to permit [an agency] to identify it and forwards the appropriate fee, [the agency] must furnish by mail a copy of the record).

## Enforcing Public Records Laws and Attorney Fees

If an agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced.<sup>8</sup> Whenever such an action is filed, the court must give the case priority over other pending cases and must set an immediate hearing date.<sup>9</sup>

Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is considered a legal consequence that is independent of the public records request.<sup>10</sup> Once an enforcement action has been filed, an agency can be held liable for attorney fees even after the agency has produced the requested records.<sup>11</sup> The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.<sup>12</sup> Granting attorney fees also makes it more likely that agencies will comply with public records laws and deter improper denials of requests.<sup>13</sup>

If the court finds that the agency unlawfully refused access to a public record, the court must order the agency to pay for the requestor's reasonable costs of enforcement, including reasonable attorney fees.<sup>14</sup> If a contractor acting on behalf of the agency fails to comply with a public records request, the requestor may sue the contractor to enforce his or her rights to have access to records.<sup>15</sup> If a court determines that the contractor unlawfully withheld public records, the court must order the contractor to pay for the cost of the enforcement lawsuit and the requestor's attorney fees in the same manner that an agency would be liable.<sup>16</sup> Attorney fees for efforts expended to obtain attorney fees are not currently permitted.<sup>17</sup>

A court will not take into consideration whether a records custodian intended to violate public records laws or was simply inept,<sup>18</sup> and it is immaterial if a records custodian did not willfully refuse to provide a public record.<sup>19</sup> In addition, to be entitled to attorney fees against the state or any of its agencies, the plaintiff must serve a copy of the pleading claiming the fees on the Department of Financial Services (DFS). DFS is then entitled to participate with the agency in the defense of the suit and any appeal thereof with respect to such fees.<sup>20</sup>

## Recent Litigation

In recent years, allegations have arisen that some individuals and entities have used public records enforcement lawsuits as a way to generate fees rather than to make lawful public records requests.<sup>21</sup>

On December 1, 2014, a circuit court judge in Duval County denied relief to a plaintiff in a lawsuit to enforce a public records request and for assessment of attorney fees.<sup>22</sup> According to the court order, the plaintiff made two separate requests for public records to a nonprofit organization under contract to provide social services for the Department of Children and Families. The contract manager refused to provide the documents because the contract manager believed the documents were not public records. The court found that the manner in which the plaintiff (and his companions) made the request ensured

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<sup>8</sup> Section 119.11, F.S.

<sup>9</sup> Section 119.11(1), F.S.

<sup>10</sup> Section 119.12, F.S.

<sup>11</sup> *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002); *Barfield v. Town of Eatonville*, 675 So. 2d 223 (Fla. 5th DCA 1996); *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012).

<sup>12</sup> *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

<sup>13</sup> *Id.*

<sup>14</sup> Section 119.12, F.S.

<sup>15</sup> *See New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993).

<sup>16</sup> *See s. 119.12, F.S.; see also New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

<sup>17</sup> *Downs v. Austin*, 559 So. 2d 246, 248 (Fla. 1st DCA 1990).

<sup>18</sup> *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

<sup>19</sup> *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014).

<sup>20</sup> Section 284.30, F.S.

<sup>21</sup> *See* Tristram Korten and Trevor Aaronson, *Florida nonprofit's ties to law firm questioned after dozens of lawsuits filed*, NAPLES DAILY NEWS, Dec. 6, 2014; Jan Pudlow, *A new scam: Public records shakedown*, THE FLORIDA BAR NEWS, Feb. 1, 2015, at 1.

<sup>22</sup> *Gray v. Lutheran Social Services of Northeast Florida, Inc.*, Final Order Denying Relief Under Public Records Act, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014).

that “they obtained exactly what they wanted, namely an initial denial of an unreasonable and bogus request.”<sup>23</sup>

The court found that the plaintiff’s method of requesting public records was an abuse of the public records laws noting that the actions of the requester amounted to “nothing more than a scam.”<sup>24</sup> The Final Order stated that the plaintiff and his attorney, who had an arrangement to split his attorney fees with the plaintiff, had “a financial interest in assuring that his requests for public records [were] refused.”<sup>25</sup> The court noted that in 2014, the plaintiff filed 18 public records lawsuits in Duval County, and that the attorney represented the plaintiff on approximately 13 of those cases; the court noted that all of the cases followed a similar pattern.

The court opined that:

If a private entity must pay an attorney’s fee every time an agent denies a needless request, the cost to the state to provide important services by contracting with private entities will increase; or private entities might discontinue bidding on these contracts. The chilling effect could be disastrous to the State. Further the [Public Records] Act was not designed to create a cottage industry for so-called “civil rights activists” or others who seek to abuse the [Public Records] Act for financial gain.<sup>26</sup>

The case was affirmed by the First District Court of Appeal on December 16, 2015.<sup>27</sup>

### **Effect of Proposed Changes**

The bill amends current law to provide that in a public records enforcement lawsuit, a court may, but is not required to, award reasonable enforcement costs, including attorney fees, to the complainant if the court determines the agency unlawfully refused to provide a public record. To be awarded such costs, the bill also requires a complainant to provide written notice of the public records request to the agency’s records custodian at least 5 business days before filing the lawsuit.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 119.12, F.S., relating to attorney fees in public records enforcement actions.

Section 2 provides an effective date of July 1, 2016.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

The bill may have a positive fiscal impact on the state if there are fewer instances when a court assesses against an agency the reasonable costs of enforcement in a public records lawsuit.

##### **2. Expenditures:**

The bill does not appear to have an impact on state expenditures.

#### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Gray v. Lutheran Social Services of Northeast Florida, Inc.*, 2015 WL 9091680 (Fla. 1st DCA 2015).

1. Revenues:

The bill may have a positive fiscal impact on local governments if there are fewer instances when a court assesses against a local government the reasonable costs of enforcement in a public records lawsuit.

2. Expenditures:

The bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a negative fiscal impact on the private sector if there are fewer instances when a court awards to a prevailing complainant in a public records lawsuit the reasonable costs of enforcement.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Written Notice

The bill does not specify how the written notice required before filing a public records enforcement action must be provided. It is unclear whether the notice must be hand-delivered or mailed and whether the 5-day period begins when the notice is submitted by the complainant or when it is received by the agency's records custodian.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.